

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

RENE LOPEZ-GALVAN,)	No. CV-F-04-6112 REC
)	(No. CR-F-99-5338 REC)
)	
)	ORDER DEEMING PETITIONER'S
Petitioner,)	APPLICATION FOR
)	CERTIFICATION OF
vs.)	APPEALABILITY TO BE MOTION
)	FOR RECONSIDERATION AND
)	DENYING DEEMED MOTION FOR
)	RECONSIDERATION
UNITED STATES OF AMERICA,)	
)	
)	
Respondent.)	
)	
)	

On May 27, 2005, petitioner Renee Lopez Galvan filed an
"Application for Certificate of Appealability".

On August 17, 2004, petitioner timely filed a motion to
vacate, set aside or correct sentence pursuant to 28 U.S.C. §
2255. By Order filed on August 20, 2004, the court denied
petitioner's motion and directed entry of judgment for
respondent. On September 2, 2004, petitioner filed a motion for
reconsideration in which petitioner contended that the court
ignored petitioner's timely filed notice of intent to expand the

1 record pursuant to Rule 7, Rules Governing Section 2255
2 Proceedings, that the court erred in denying petitioner's Section
3 2255 motion, and raised grounds for relief not previously
4 asserted in the Section 2255 motion. By Order filed on September
5 16, 2004, the court denied the motion for reconsideration, ruling
6 that no notice of intent to expand the record had been filed by
7 petitioner, that the court's ruling denying the Section 2255
8 motion was correct and that petitioner's remedy was appeal the
9 denial of the Section 2255 motion to the Ninth Circuit, and that,
10 to the extent the motion for reconsideration raised new claims
11 for relief, the motion for reconsideration was a second or
12 successive Section 2255 motion, requiring petitioner to move in
13 the Ninth Circuit Court of Appeals for an order authorizing this
14 court to consider the application. Petitioner did not file a
15 notice of appeal in connection with the denial of his Section
16 2255 motion or with the denial of his motion for reconsideration.
17 However, petitioner asserts that he filed a "Motion for Order
18 Authorizing District Court To Consider Motion for
19 Reconsideration" with the Ninth Circuit on September 27, 2004.
20 Thereafter, petitioner asserts that he filed a letter with the
21 Ninth Circuit requesting a status report concerning the motion.
22 By Order filed on March 31, 2005 in No. 05-70124 the Ninth
23 Circuit ruled:

24 We have reviewed petitioner's 'letter
25 addressing the court,' received January 3,
2005.

26 To the extent petitioner's letter requests

1 mandamus relief, the petition is denied
2 because petitioner has not demonstrated that
3 this case warrants the intervention of this
court by means of the extraordinary remedy of
mandamus

4 To the extent petitioner requests permission
5 to file a second or successive section 2255
6 habeas corpus petition in the district court,
the request is also denied.

7 No petition for rehearing or motion for
8 reconsideration shall be filed or entertained
in this case

9 All pending motions are denied as moot.

10 Although captioned an "Application for Certificate of
11 Appealability", it is apparent that petitioner is moving for
12 reconsideration of the court's denial of his motion for
13 reconsideration. A certificate of appealability is the procedure
14 by which a petitioner appeals the denial of a Section 2255
15 motion. See 28 U.S.C. § 2253. Because petitioner did not file a
16 notice of appeal from either the denial of the motion for
17 reconsideration or the denial of the Section 2255 motion,
18 petitioner's reference to a certificate of appealability is
19 meaningless. Consequently, the court deems petitioner's
20 Application for Certificate of Appealability to be a motion for
21 reconsideration of the denial of his Section 2255 motion and of
the denial of his initial motion for reconsideration.

22 So deemed, petitioner's motion for reconsideration must be
23 construed pursuant to Rule 60(b), Federal Rules of Civil
24 Procedure. Petitioner's ground for relief in the deemed motion
25 does not satisfy any of the categories for reconsideration set
26

1 forth in Rule 60(b) and is, in any event, without substantive
2 merit.

3 In his application, petitioner contends that this court
4 violated United States v. Seesing, 234 F.3d 456 (9th Cir. 2000)
5 "by not advising pro-se petitioner of the ability to choose the
6 option available and by mis-construing petitioners true
7 intentions as explained in the motions misconstrued." Petitioner
8 asserts that he "would vie for - option (3) withdraw the motion
9 and file one all-inclusive 28 U.S.C. § 2255 within the one-year
10 statutory period [sic]."

11 In Seesing, the district court deemed a letter from the
12 petitioner therein which purported to withdraw a guilty plea and
13 denying the district court's jurisdiction over the petitioner in
14 the criminal case as a motion for relief pursuant to 28 U.S.C. §
15 2255 and denied the deemed motion. The Ninth Circuit held in
16 pertinent part:

17 When presented with a pro se motion that
18 could be recharacterized as a Section 2255
19 motion, a district court should not so
20 recharacterize the motion unless: (a) the pro
21 se prisoner, with knowledge of the potential
22 adverse consequences of such a
23 recharacterization, consents, or (b) the
24 district court finds that because of the
25 relief sought that the motion should be
26 recharacterized as a 28 U.S.C. § 2255 motion
and offers the pro se prisoner the
opportunity, after informing the prisoner of
the consequences of recharacterization, to
withdraw the motion. Under either scenario,
the pro se petitioner has the option to
withdraw the motion and file one all-
inclusive 28 U.S.C. § 2255 motion within the
one-year statutory period.

1 234 F.3d at 464.

2 Seesing has no application to petitioner. The motion
3 petitioner filed on August 17, 2004 is captioned "Motion Under 28
4 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence By a
5 Person in Federal Custody". The motion for reconsideration filed
6 on September 2, 2004 is captioned "Motion for Reconsideration of
7 Court Order Denying Petitioner's 28 U.S.C. § 2255 [sic]". Unlike
8 Seesing, this court did not recharacterize petitioner's
9 pleadings.¹

10 ACCORDINGLY:

11 1. Petitioner's "Application for Certificate of
12 Appealability" is deemed to be a motion for reconsideration.

13 2. Petitioner's deemed motion for reconsideration is
14 denied.

15 IT IS SO ORDERED.

16 **Dated: June 3, 2005**
668554

/s/ Robert E. Coyle
UNITED STATES DISTRICT JUDGE

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21
22 ¹Furthermore, it is apparent that petitioner is attempting by
23 this pleading to circumvent his failure to timely appeal the denial
24 of his Section 2255 motion and the denial of his motion for
25 reconsideration. See Rule 11, Rules Governing Section 2255
26 Proceedings for the United States District Courts; Rule 4(a),
Federal Rules of Appellate Procedure.